

FILED
DISTRICT COURT OF GUAM
OCT 29 2004
MARY L. M. MORAN
CLERK OF COURT

UNITED STATES DISTRICT COURT
TERRITORY OF GUAM

JAY MERRILL, on his own behalf and on
behalf of all other similarly situated voters
desirous of casting a vote in favor of Proposal
A at a fair and legal election,

Plaintiffs,

v.

CIVIL CASE NO. CV-04-00046

THE GUAM ELECTION COMMISSION;
GERALD A. TAITANO, in his individual
capacity and in his capacity as Executive
Director of the Guam Election Commission; I
MINA' BENTE SIETE NA LIHESLATURAN
GUAHAN (The 27th Guam Legislature);
FELIX P. CAMACHO, in his official capacity
as the Governor of Guam,

Defendants.

ORDER

Before the Court is an Amended Stipulation and Proposed Order for Preliminary Injunction signed by Thomas L. Roberts, Esq., attorney for plaintiff and Robert M. Weinberg, Asst. Attorney General, purportedly on behalf of all defendants in this case. For the following reasons, the Court will not accept the stipulation and instead will stay the matter pending the November 2, 2004 election day.

BACKGROUND

On October 25, 2004, plaintiff filed this action in the Superior Court of Guam against the Guam Election Commission, Gerald Taitano in his individual and official capacity as Executive Director of the Guam Election Commission, the Legislature of Guam and Felix P. Camacho in his official capacity as the Governor of Guam. Claiming that the Guam Election Commission's actions violated federal constitutional law via 42 U.S.C. § 1983 as well as Guam statutory law, plaintiff sought,

1. An immediate pre-election judicial declaration on (a) the legal efficiency of the Proposal A ballot pamphlets mailed to the voters by the Directors and the Guam Election Commission, (b) an immediate, pre-election judicial declaration on whether the results of any vote on Proposal A on November 2, 2004 will be invalid as a result of (i) the ballot pamphlets mailed to the voters, and/or (ii) as a result of the mass public uncertainty caused by the Attorney General's opinion.
2. For a preliminary and permanent injunction (a) enjoining the scheduled November 2, 2004 vote on Proposal A, (b) compelling the Director and the Election Commission to remove the Proposal A ballots from the polling places on November 2, 2004, and (c) enjoining the Director and the Election Commission from tabulating any absentee votes cast on Proposal A.
3. For an order compelling the Governor to call for a special election on Proposal A pursuant to 3 G.C.A. § 13103, or an order compelling the Legislature to call for a special election on Proposal A pursuant to 3 G.C.A. § 17203, or an order compelling the Election Commission to schedule and hold a special election on Proposal A, to be held not later than sixty (60) days after the date of the court's order...

Asserting the existence of federal question subject matter jurisdiction, the Attorney General of Guam removed the case to this Court on October 26, 2004. On October 28, 2004, plaintiff and the Attorney General of Guam ("AG") filed the Amended Stipulation and Proposed Order for Preliminary Injunction now before the Court. In the Stipulation, the plaintiff and AG agreed that the Guam Election Commission violated Guam law and the United States Constitution. Counsel further agreed that, as a result of the Guam Election Commissions' failures, Proposal A was invalid. Finally, plaintiff and the AG agreed that the Guam Election Commission was preliminarily enjoined from counting and tabulating the votes for and against Proposal A. Subsequent to the filing of the Stipulation, the Guam Legislature and Governor Camacho filed objections to the Stipulation. Further, it has come to the attention of Court that the Legislature has passed, and the Governor has signed into law on October 27, 2004, Bill 374, a bill apparently meant to remedy any defects surrounding Proposal A.

DISCUSSION

1. There now appears to be a controversy as to whether the AG represents the defendants in this case. In the Notice of Removal, the AG claims that it represents all defendants in this case. Nevertheless, separate attorneys have entered appearances on behalf of the Legislature and the Governor.

Furthermore, the Legislature and the Governor filed objections to the stipulation. It seems inappropriate to bind the Government of Guam to a stipulation and order where it appears that the AG may not be the government's counsel. Accordingly, the Court will not accept the stipulation.

2. The Court will not grant a preliminary injunction and will also *sua sponte* stay this action pending the November 2, 2004 election results.

a. The probability of success for plaintiff has become less clear with the passage of Bill 347. Moreover, plaintiff will not suffer irreparable harm. Plaintiff will still be able to litigate the validity of Proposal A and possibly compel the government to conduct another election.

b. The balance of harms also weighs in favor of not granting a preliminary injunction and staying this action pending the November 2, 2004 election results. If Proposal A passes, then this whole action becomes moot. If Proposal A fails, plaintiff still has an opportunity to test the lawfulness of Proposal A's electoral process. If the process is lawful, then Guam saves the expense of conducting another election. If found unlawful, then another election is conducted and plaintiff is exactly where he always wanted to be.

c. Not granting a preliminary injunction and staying the action pending the November 2, 2004 election results will also be in the public interest. This is a matter of deep public concern. Much time, money and effort has been put into this election by all citizens on both sides of the issue. It is always in the public interest for the citizenry to have their say on an important matter such as Proposal A.

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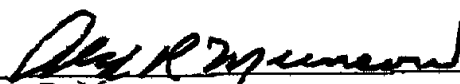
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1 **CONCLUSION**

2 Based on foregoing, it is **ORDERED** that Amended Stipulation and Proposed Order for
3 Preliminary Injunction filed on October 28, 2004 is **DENIED**. It is further **ORDERED** that this
4 matter is stayed pending the November 2, 2004 election results.

5 DATED this ^{EH}29 day of October, 2004

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8 Alex R. Munson
9 Designated Judge, United States District Court
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